Filed 2/9/09 P. v. Martin CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TROY RYNELL MARTIN, Defendant and Appellant.	G039730 (Super. Ct. No. 06SF0736) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed.

Maureen M. Bodo, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry J.T. Carlton and Jeffrey J. Koch, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Troy Rynell Martin appeals from a judgment of conviction for unlawfully taking or driving a vehicle, with a prior conviction for the same crime. Defendant raises three arguments on appeal, each of which we reject.

First, defendant argues the waiver of his right to remain silent was not voluntary, and his statement to the arresting officers should therefore have been excluded by the trial court. Although the officers pointed loaded weapons at defendant before he was detained, they did not read defendant his rights, seek a waiver of those rights, or obtain a statement from defendant until the situation had "settled down." No weapons were drawn or pointed at defendant when he waived his rights and made a statement to the officers. Defendant's waiver of his rights was voluntary, and the trial court did not err in admitting the statement defendant made to the police after waiving his rights.

Second, defendant argues there was insufficient evidence presented at the preliminary hearing that a crime was committed in Orange County, and the trial court therefore erred in denying his motion to set aside the information on venue grounds. We conclude there was sufficient evidence that defendant undertook an act or effect requisite to the consummation of the crime charged—namely, the act of taking possession of the vehicle—and venue was therefore appropriate in Orange County. (Pen. Code, § 781.)

Finally, defendant argues the modified version of CALCRIM No. 1820 (which sets forth the elements of the crime of taking or driving a vehicle) was vague and ambiguous. We conclude that, when considered in the context of the overall charge, there is no reasonable likelihood the jury misunderstood or misapplied the instruction.

Therefore, we affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Weslee Mattison, a resident of San Clemente, California, co-owned a Ford pickup truck with his mother. In July 2006, Mattison invited defendant to stay with him. On July 22, 2006, defendant told Mattison he had received telephone calls from friends about going to a reunion. Mattison told defendant he could borrow Mattison's pickup truck; Mattison was not using the truck because he did not have a driver's license at the time.

Later that day, defendant mentioned to Mattison that he might borrow the truck to help his mother or a friend move. Mattison again told defendant he could use the truck. That evening, defendant said he was going to the reunion, and Mattison again offered defendant the use of his truck. Mattison and defendant did not discuss the day or time defendant would return the truck, but, when defendant left in the truck on the evening of July 22, Mattison expected him to return it the next day.

Defendant did not return on July 23. Mattison called defendant's mother, who told Mattison defendant had stopped by her home after the reunion. Mattison again called defendant's mother on July 24; she had not seen defendant, but told Mattison if she did see defendant she would have him call Mattison. Also on July 24, Mattison called a friend of defendant's, who had not seen defendant since the day of the reunion.

Mattison called 911 on July 24, and told the dispatcher he had loaned his truck to a friend who had not returned it. Mattison was told the police would not file a stolen vehicle report unless he had specified a time frame within which defendant was to have returned the truck. Mattison stated that he had loaned the truck to defendant for no more than a couple of hours, and that defendant did not have permission to keep the truck.

About 11:00 p.m. on July 29, 2006, Los Angeles County Sheriff's Deputies Ethan Marquez and Doug Shive saw two people slouching down inside a pickup truck parked in Rancho Dominguez, an unincorporated area of Los Angeles County. The

deputies contacted the people in the truck, one of whom was defendant. Defendant identified himself as Weslee Mattison, but had trouble spelling that name. According to Deputy Marquez, "[h]e was hesitating, tripping over his words. He tried to spell it a few times. Spelled it different ways."

During the contact, the deputies learned the truck had been reported stolen. They also learned defendant was on parole and was armed and dangerous. Both deputies drew weapons and pointed them at defendant. A police helicopter and at least five other patrol cars arrived at the scene; the patrol cars had their lights and sirens on, and the deputies exited the cars with their guns drawn. The deputies detained defendant at gunpoint, and placed him in the backseat of Deputy Marquez's patrol car. After defendant and the passenger were handcuffed and placed in the patrol cars, the deputies confirmed there was no one else in the truck, "and then we all holstered our weapons."

Deputy Shive read defendant his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). At that time, no weapons were drawn, much less pointed at defendant, and everything had "settled down." Defendant then waived his rights. Defendant then gave the deputies his real name, and admitted he had lied when he stated his name was Mattison. He told the deputies he knew the truck was "hot," and claimed he rented the truck from Mr. Robinson in Compton for an eighth of an ounce of marijuana. Defendant said he had had the truck for a couple of days. He never told the deputies he had borrowed the truck, or that it actually belonged to Mattison.

Defendant was charged in an information with taking or driving a vehicle, with a prior conviction for the same offense. (Veh. Code, § 10851, subd. (a); Pen. Code, § 666.5, subd. (a).) The information alleged defendant had suffered a prior serious felony strike (Pen. Code, §§ 667, subds. (d) & (e)(1), 1170.12, subds. (b) & (c)(1)), and had four prison priors (Pen. Code, § 667.5, subd. (b)).

Defendant filed a motion to dismiss the information on the ground there was insufficient evidence he had committed a crime within the jurisdiction of Orange County. (Pen. Code, § 995.) The trial court denied defendant's motion.

Immediately before opening statements were made, defendant's counsel made an oral motion to suppress defendant's statement to the police on the ground his waiver of rights under *Miranda* and his subsequent statement to the police were involuntary. The trial court conducted a hearing under Evidence Code section 402, after which it denied the motion. A jury found defendant guilty. Defendant admitted the serious felony strike and the prison priors.

The trial court sentenced defendant to four years in prison. Defendant was sentenced to the low term of two years; the sentence was doubled because of the prior serious felony strike. The court struck the four prison priors for sentencing purposes.

Defendant timely appealed.

DISCUSSION

I.

THE TRIAL COURT DID NOT ERR IN ADMITTING DEFENDANT'S POST-MIRANDA *STATEMENT.*

We review independently the trial court's determinations of whether defendant's statements were voluntary, and whether the waiver of his *Miranda* rights was knowingly, intelligently, and voluntarily made. (*People v. Rundle* (2008) 43 Cal.4th 76, 115.) In so doing, we accept the trial court's resolution of disputed facts and inferences, and credibility evaluations, as long as they are supported by substantial evidence. (*Ibid.*)

Defendant argues his waiver of his *Miranda* rights was not voluntary, because it was made under coercive conditions. Deputy Marquez drew his weapon and advised defendant that Deputy Shive was pointing a racked shotgun at defendant. A police helicopter and several other patrol cars, with lights flashing and sirens blaring,

converged on the scene. All the other officers drew their weapons and pointed them at defendant. Had defendant waived his *Miranda* rights at this point, we would agree the waiver was not voluntary.

But that is not the end of the story. After defendant was handcuffed and placed in the patrol car, the deputies searched the truck to be sure no one else was inside, and then put their weapons away. Some of the other deputies left the scene, and none of the remaining deputies had his or her gun drawn. Deputy Marquez confirmed that, although the scene had been extremely tense, he had not read defendant his *Miranda* rights until "everything settled down and all our anxiety went down." No guns were drawn or pointed at defendant when he was read his rights. In response to the prosecutor's question, "[a]nd it was after the guns were put back in your holster, returned to wherever they belonged, that's when defendant was read his *Miranda* rights," Deputy Marquez responded, "[y]eah." (Italics added.) None of the deputies made any promises or threats to defendant in connection with the waiver of those rights. The trial court did not err in concluding that, under the circumstances, there was no evidence defendant was incapable of making a free and rational choice when he waived his rights.

Defendant cites several cases in which the appellate courts concluded the defendants' waivers of their rights were not involuntary, under circumstances with fewer initial shows of force. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 58; *People v. Williams* (1997) 16 Cal.4th 635, 659; *People v. Clark* (1993) 5 Cal.4th 950, 981-982.) The holdings of these cases, however, cannot be extended to mean that any time a defendant is detained or arrested at gunpoint, any subsequent waiver of rights must be involuntary as a matter of law. The trial court did not err in admitting defendant's post-*Miranda* statement to the deputies.

II.

VENUE WAS PROPER IN ORANGE COUNTY.

Before trial, defendant moved to set aside the information because there was insufficient evidence adduced at the preliminary hearing that a crime had been committed in Orange County. A motion under Penal Code section 995 reviews the sufficiency of the information on the basis of the record made before the magistrate at the preliminary hearing. (*People v. Sherwin* (2000) 82 Cal.App.4th 1404, 1411.) When we review the trial court's order denying a motion under section 995, we "disregard[] the ruling of the superior court and directly review[] the determination of the magistrate holding the defendant to answer. [Citations.]" (*People v. Laiwa* (1983) 34 Cal.3d 711, 718.) "'[E]very legitimate factual inference must be drawn to uphold the magistrate's decision.' [Citation.] If there is some evidence to support the magistrate's order, the reviewing court will not inquire into its sufficiency. [Citation.]" (*People v. Scott* (1999) 76 Cal.App.4th 411, 416.)

The basic rule of venue in criminal cases is set forth in Penal Code section 777: "Every person is liable to punishment by the laws of this State, for a public offense committed by him therein, except where it is by law cognizable exclusively in the courts of the United States; and except as otherwise provided by law the jurisdiction of every public offense is in any competent court within the jurisdictional territory of which it is committed." Penal Code section 781 contains the exception to the general rule applicable in this case: "When a public offense is committed in part in one jurisdictional territory and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction of such offense is in any competent court within either jurisdictional territory."

The Supreme Court summarized the rule of Penal Code section 781 as follows: "[W]hen a crime is committed partly in one county and partly in another county,

or when the acts or effects constituting the crime or requisite to its commission occur in more than one county, venue is in the superior court in each of the counties in question, and a defendant may be tried in any of them. [Citation.]" (*People v. Posey* (2004) 32 Cal.4th 193, 199-200.) Section 781 must be liberally construed to vest venue in the criminal court in any county where preliminary acts leading to the commission of a crime occur. (*People v. Simon* (2001) 25 Cal.4th 1082, 1109.)

The testimony at defendant's preliminary hearing was limited. An Orange County Sheriff's deputy testified she took a stolen vehicle report from Mattison on July 24, 2006. Mattison told the deputy that at 9:00 p.m. on July 22, 2006, he had loaned his vehicle to defendant for two hours, but defendant never returned it. Deputy Marquez testified he contacted defendant in the Ford pickup truck in Los Angeles County on July 30; during the contact, he learned the truck had been reported stolen, defendant was identified as the suspect, and defendant was armed and dangerous. Does this testimony support a finding that venue was proper in Orange County? Yes.

As our Supreme Court has explained: "What is important for present purposes is the phrase in [Penal Code] section 781 that speaks of 'acts or effects . . . requisite to the consummation' of a crime which establish venue in any county in which they occur. The words 'acts . . . requisite to the consummation' of a crime establishing venue in a county have been liberally construed to embrace *preparatory* acts [citations], such as the following: the theft of firearms in a county leading to a murder [citation]; meetings with an accomplice and victims in a county to make arrangements pursuant to a scheme to produce a pornographic film, resulting in the victims' murder [citation]; a kidnapping in a county leading to a murder [citation]; and striking and fleeing from a police officer in a county in an automobile in order to avoid taking a field sobriety test, resulting in assault with a deadly weapon [citation]. By the same token, the words 'effects . . . requisite to the consummation' of a crime establishing venue in a county should be liberally construed to embrace *preparatory* effects, such as the placement of a

telephone call into a county leading to a crime. In *People v. Price* (1989) 210 Cal.App.3d 1183, 1189–1192 . . .—on which the trial court relied in formulating its instructions—the Court of Appeal so construed the words in question, holding, on facts similar to those here involving the sale or transportation of cocaine, that a 'telephone call for the purpose of planning a crime received within [a] county is an adequate basis for venue, despite the fact the call was originated outside the county' [citation]. Although we recognize that the holding of the Court of Appeal in *Price* represents the most liberal construction of the words 'effects . . . requisite to the commission' of a crime reflected in a reported decision, we cannot find its holding unsound." (*People v. Posey*, *supra*, 32 Cal.4th at p. 219, fn. omitted.) The Supreme Court concluded that by placing phone calls to Marin County from San Francisco as part of the negotiations leading to his sales of cocaine base in San Francisco, the defendant had subjected himself to venue in the criminal court in Marin County. (*Id.* at pp. 220-221.)[1]

Using the same reasoning, we conclude the act of taking possession of Mattison's truck in Orange County was an act or effect requisite to the consummation of the crime charged.[2]

---

[1] Defendant notes that in *People v. Posey*, *supra,* 32 Cal.4th at page 219, the Supreme Court cited a number of criminal acts as examples of preparatory acts justifying venue under Penal Code section 781. However, the preparatory acts justifying venue in *People v. Posey* itself were the placement of telephone calls – which are not in and of themselves criminal acts. *People v. Posey* does not stand for the proposition that only criminal acts can be preparatory acts sufficient to justify venue under section 781.

[2] The reasons for including venue provisions are set forth in *People v. Simon*, *supra,* 25 Cal.4th at page 1095. First, setting venue in the place where the crime was committed makes it easier to obtain evidence and ensure witnesses are available. (*Ibid.*) Second, the venue provisions prevent the prosecution from choosing a locale for trial with no reasonable relationship to the crime, which would be favorable to the prosecution or hostile to the defendant. (*Ibid.*) Third, the community in which the crime occurs has an interest in seeing that crimes committed there are prosecuted. (*Ibid.*) Although our analysis is not driven by a determination of whether these goals are served in this case, we note that our ultimate conclusion that venue was proper in Orange County advances each of these goals.

III.

CALCRIM NO. 1820, AS GIVEN TO THE JURY, WAS NOT VAGUE AND AMBIGUOUS.

CALCRIM No. 1820 does not address the specific situation presented in this case – where defendant initially had permission to take the victim's vehicle, but exceeded the scope of that permission and did not return it. The prosecutor therefore presented a modified version of CALCRIM No. 1820. The trial court further modified the proposed instruction; both defendant's counsel and the prosecutor agreed the instruction as modified was acceptable.

The following modified version of CALCRIM No. 1820 was read to the jury: "The defendant is charged in count 1 with unlawfully taking or driving a vehicle, pursuant to Vehicle Code section 10851. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] One. The defendant took or drove someone else's vehicle without the owner's consent. [¶] And, two. When the defendant did so he intended to deprive the owner of possession or ownership of the vehicle for any period of time. [¶] Even if you conclude that the owner had allowed the defendant or someone else to take or drive the vehicle before, you may not conclude that the owner consented to the driving on July 22nd, 2006, based on that previous consent alone. [¶] Where a person retains or drives a car after the expiration of the owner's consent, that may constitute a taking or driving without the owner's consent."

The Attorney General initially argues defendant forfeited the right to raise this issue on appeal because defendant's trial counsel agreed to it as given. Defendant counters with Penal Code section 1259, which provides in relevant part: "The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." We need not decide either if the alleged ambiguity of the modified version of CALCRIM No. 1820 affected defendant's substantial rights, or if Penal Code section 1259 applies not only when no objection is made to an instruction,

but when defendant affirmatively agrees it should be given. We will reach the merits of defendant's claim to forestall the inevitable claim of ineffective assistance of counsel.

"'When considering a challenge to a jury instruction, we do not view the instruction in artificial isolation but rather in the context of the overall charge. [Citation.] For ambiguous instructions, the test is whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction. [Citation.]' [Citation.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1075.)

First, defendant argues the phrase, "the owner had allowed . . . someone . . . to take or drive the vehicle before," is vague because it fails to specify "[b]efore what." Defendant notes that the instruction could be referring to Mattison having previously given his girlfriend permission to use the truck for about a month, or to Mattison giving defendant permission before July 22 to "go ahead and use my truck whenever he wanted to do that." Even if the instruction referred to either or both of those instances, it was still correct.

Defendant also argues the language could refer to the time on July 22, immediately before defendant left for the reunion, when Mattison consented to defendant's use of the truck. We do not agree this is a reasonable interpretation of the instruction's language. When considering the entire paragraph, it is clear the word "before" refers to a time before July 22. Indeed, the instruction uses the words "before" and "previous."

Finally, defendant suggests the phrase, "you may not conclude that the owner consented to the driving on July 22nd, 2006, based on that previous consent alone," was misleading. Again, when the instruction is considered as a whole, it is internally consistent and presents a correct statement of the law.

There is no reasonable likelihood the jury misunderstood or misapplied the instruction. We reject defendant's arguments to the contrary.

Finally, defendant argues the cumulative error of the finding that venue was proper in Orange County and of the instruction with the modified version of CALCRIM No. 1820 deprived him of a fair trial, requiring reversal. As explained *ante*, there was no error, and we therefore conclude there was no cumulative error.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

O'LEARY, ACTING P. J.

MOORE, J.